

Insights

PRACTICALLY COMPLETE OR COMPLETELY IMPRACTICAL? NAVIGATING THE PITFALLS OF WHAT CONSTITUTES PRACTICAL COMPLETION

Feb 08, 2019

SUMMARY

Many a construction dispute turns on defects. A significant subset of those turn on whether the existence of defects prevents practical completion from taking place. It's not surprising that these situations are contentious: contractors are keen that practical completion is certified so as to avoid or limit their liability for liquidated damages, trigger the return of retention monies and, often, to bring about an assessment of sums they consider due under the final account. Employers may be understandably reluctant to take possession of a property which they consider defective and by resisting practical completion an employer can put pressure on a contractor by withholding sums that would otherwise become due.

Practical completion is therefore an important concept in construction contracts, although one that is often not precisely defined, which can cause uncertainty and hinder the operation of the contract.

The generally accepted principles regarding practical completion are set out in paragraph 20-169 of Keating on Construction Contracts (Sweet and Maxwell, tenth edition, 2016):

- Construction works can be practically complete notwithstanding latent defects.
- The certificate of practical completion may not be issued if there are patent defects.
- Practical completion means the completion of all the construction work that has to be done.
- There is discretion to certify practical completion where very minor, "de minimis" items of work are left incomplete.

The TCC has recently considered issues arising out of practical completion in two separate cases. They provide a recap of relevant principles, serve as a good reminder of the rules of contract

interpretation and, perhaps, suggest a change in the judiciary's approach to determining what constitutes practical completion.

Mears v Costplan

In *Mears v Costplan*, Mears sought to challenge the certification of practical completion under an agreement for lease for blocks of student accommodation that were under construction. Mears was obliged to take a lease on practical completion being certified, so long as practical completion occurred before the contractual longstop date. Practical completion was not defined in the agreement for lease or the building contract.

The agreement for lease prescribed certain floor areas for the rooms within the property but, much to Mears' dismay, the property was not constructed in accordance with those requirements: 56 of the rooms in the property were smaller than they should have been. Mears looked to avoid its obligation to take the lease, arguing that practical completion could not occur.

Mears sought declaratory relief on a number of points, which were summarised by Waksman J as follows:

"[that] there cannot...validly be a certificate of practical completion where there are material and substantial breaches of the agreement for lease concerning the works or (if different) material and/or substantial defects in the works."

The formulation of the declarations did not require the court to decide whether practical completion had occurred on the facts of the case. However, having adopted Keatings' explanation of what constitutes "practical completion", the court nonetheless provided the following useful commentary on the factors which should determine whether practical completion has taken place:

- Practical completion is, to some extent, about finishing all work that has to be carried out save for trivial outstanding works (the judge gave the example of an outstanding gate at the side of a newly built house).
- Practical completion is not solely concerned with the quantity of work done, but also the standard to which it is completed. Patently defective work will generally prevent practical completion.
- Works do not have to completely conform with the contract to be capable of achieving practical completion, provided the non-conformity is insignificant. In determining this it is important to have regard to the purpose and intent of the thing being constructed. If building a house, for example, it should be fit for occupation. Fitness for occupation is a relevant fact which would count in favour of practical completion having occurred.
- There may also be defects in a building that are not detrimental to its usage that are relevant factors in determining whether practical completion has occurred. For example, a building that

has been painted the wrong colour or with the wrong finish.

- A breach that is not realistically capable of remedy can prevent practical completion from taking place, but that is not the inevitable consequence. It does not mean that practical completion cannot occur. Each case is fact-specific.

Mears v Costplan could therefore be read as an indication that the judiciary is moving away from the principles summarised in *Keating*, to a more flexible approach that takes into account the intent and purpose of what is being constructed. However, that may well be too strong an interpretation of this case, especially in the absence of other judicial decisions. At the very least, this judgment provides useful guidance for industry professionals considering whether practical completion has occurred.

University of Warwick v Balfour Beatty

University of Warwick v Balfour Beatty concerns the interpretation of a long and detailed definition of practical completion in a building contract. Although it offers less in the way of useful guidance than *Mears*, it nevertheless provides a useful reminder of the basis on which contracts should be interpreted and the importance of clear and accurate drafting.

The University of Warwick entered into an amended JCT D&B contract, 2011 Edition with Balfour Beatty. The University sought a declaration regarding the contract's practical completion provisions, which Balfour Beatty asserted were unclear and nullified the liquidated damages provisions.

The contract provided for sectional completion, with the completion date for sections 1-3 being about three months before that of section 4. The contract defined practical completion, essentially as:

"a stage of completeness of the Works or a Section which allows the Property to be occupied or used."

The Property was defined as:

"the property comprised of the completed Works".

The contract provided that a practical completion statement was to be issued on practical completion of the works and also of each section. Liquidated damages would be levied if practical completion of the works or a section was late.

Balfour Beatty argued that the definition of practical completion meant that the works as a whole had to be completed before a single section could be certified as practically complete. In essence, its argument was that the property could not be occupied and used until all four sections were practically complete. It asserted that had the effect of making the contract's liquidated damages provisions inoperable.

Contrary to an earlier adjudication decision, the court held that individual sections could be certified as practically complete before the works as a whole were complete. It followed that the liquidated damages provisions were not inoperable.

The court applied the well known principles of contract interpretation, finding that the ordinary meaning of the words used and the intention of the parties clearly pointed to the fact that a section of the works could be certified as practically complete in isolation from the other sections. In particular, the definition of practical completion made it clear that one section of the works could be certified as practically complete separately from the others. Furthermore, the parties clearly intended to introduce a sectional completion regime and therefore that they intended to allow separate practical completion of each of the sections.

Concluding thoughts

For me, while it is unusual to see lengthy definitions of practical completion in building contracts, the judgment in *Mears v Costplan* is the more interesting of the two cases. The guidance on ascertaining whether practical completion has been achieved will be welcomed by many in the construction industry. However, it raises questions about how it fits within established precedent. It will be interesting to see whether future judgments do indeed indicate a judicial rethink of practical completion.

Both cases emphasise the need to draft building contracts carefully. University of Warwick is a reminder to all contract drafters to ensure that they set out clearly the agreement that the parties have negotiated. Although the liquidated damages provisions were upheld, the cost and disruption of court and adjudication proceedings might have been avoided by more careful drafting. *Mears* suggests that the intent and purpose of the completed works is an important factor in determining whether practical completion has been achieved. We may therefore start to see contract drafters include provisions to this effect.

This article first appeared on the Practical Law Construction blog dated 23 January 2019.

RELATED CAPABILITIES

- Construction Disputes
- Real Estate

MEET THE TEAM



Shy Jackson

London

shy.jackson@bclplaw.com

+44 (0) 20 3400 4998



James Clarke

London

james.clarke@bclplaw.com

+44 (0) 20 3400 3507

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

